

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2010 MSPB 45

Docket No. SF-0752-09-0661-I-1

**Robert Morton,
Appellant,**

v.

**Department of Veterans Affairs,
Agency.**

March 4, 2010

Louisa B. Pensanti, Esquire, Sherman Oaks, California, for the appellant.

Evan Stein, Esquire, Los Angeles, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of the August 31, 2009 initial decision that dismissed his appeal for failure to prosecute. For the reasons set forth below, we DISMISS the PFR as untimely filed with no showing of good cause for the delay.

BACKGROUND

¶2 After the appellant was removed, attorney Louisa B. Pensanti filed an appeal on his behalf via e-Appeal Online, the Board's electronic filing system. *See* Initial Appeal File (IAF), Tab 1. On August 31, 2009, the administrative

judge issued an initial decision, which dismissed the appeal for failure to prosecute, because neither the appellant nor his representative appeared for three scheduled telephonic status conferences and neither filed any substantive response to the administrative judge's three Orders to Show Cause. IAF, Tab 14. The initial decision stated that it would become final on October 5, 2009, unless a PFR was filed by that date. *Id.* at 5.

¶3 On October 20, 2009, Ms. Pensanti submitted a declaration, made under penalty of perjury, to the Office of the Clerk of the Board (OCB) stating that she did not receive the initial decision until October 13, 2009, when agency counsel e-mailed it to her, and requesting that the date of issuance of the initial decision be changed to October 13, 2009. *See* Petition for Review File (PFR File), Tab 1 at 1 (request), 2 (declaration). OCB informed Ms. Pensanti that it was denying her request to change the issuance date to October 13, 2009, because the date that she received the initial decision was not relevant to the date that it was issued. PFR File, Tab 2 at 1. OCB also indicated in this correspondence that it did not consider her prior submission as a PFR, since she did not indicate it as such. *Id.*

¶4 On November 12, 2009, Ms. Pensanti filed another submission with OCB, which included another declaration, made under penalty of perjury, reiterating that she did not receive the initial decision until agency counsel sent it to her on October 13, 2009, and appearing to state that she was filing a PFR. *See* PFR File, Tab 3 at 2. On December 3, 2009, OCB sent a letter to Ms. Pensanti, acknowledging October 19, 2009 as the filing date for the PFR* and notifying her that the PFR was untimely filed. The letter further advised her that the Board's regulations required her to file a motion to accept the filing as timely and/or to waive the time limit for good cause. PFR File, Tab 4 at 1. OCB further advised Ms. Pensanti that such a motion should include a statement signed under penalty

* As mentioned above, Ms. Pensanti's initial submission was not mailed until October 20, 2009; however, this discrepancy is not relevant to our analysis.

of perjury or an affidavit showing that the PFR was timely filed or that there was good cause for the late filing. *Id.* at 2. OCB also stated in this correspondence that if she claimed that she did not receive the initial decision within 5 days of its issuance, she had to provide evidence to support that assertion, and that if her submission was still not timely, she had to show good cause for the additional delay in filing her PFR. *Id.* Finally, OCB included a “Motion to Accept Filing as Timely or to Waive Time Limit” form and stated that the “motion and properly signed statement must be postmarked if mailed or sent by facsimile on or before December 18, 2009.” *Id.* (emphasis in original); *see id.* at 6-7 (motion). To date, neither Ms. Pensanti nor the appellant filed any further submissions.

ANALYSIS

¶5 To be timely, a PFR must be filed within 35 days after the initial decision was issued or, if the appellant shows that he received the initial decision more than 5 days after it was issued, within 30 days after the date it was received. [5 C.F.R. § 1201.114](#)(d). Here, the initial decision was issued on August 31, 2009, and it stated that it would become final on October 5, 2009, unless a PFR was filed by that date. IAF, Tab 14 at 5. The PFR was not filed until October 19, 2009.

¶6 Ms. Pensanti claims that she did not receive the initial decision until October 13, 2009. *See* PFR File, Tabs 1, 3. We reject her contention that she did not receive the initial decision until this late date. As we discussed in *Rivera v. Social Security Administration*, [111 M.S.P.R. 581](#), ¶ 5 (2009):

Our e-filer regulations provide that, as a registered e-filer, the appellant agreed to accept documents through electronic service and, further, that he was required to monitor his case activity at the Repository at e-Appeal Online to ensure that he received all case related documents. [5 C.F.R. § 1201.14](#)(e), (j)(3). Moreover, our regulations provide that pleadings and Board documents served electronically on registered e-filers are deemed received on the date of electronic submission. [5 C.F.R. § 1201.14](#) (m)(2). When a statute or regulation “deems” something to have been done, the event is

considered to have occurred whether or not it actually did. *See Lima v. Department of the Air Force*, [101 M.S.P.R. 64](#), ¶ 5 (2006). Thus, we deem the appellant to have received the initial decision on January 12, 2009, and his petition was, therefore, filed 5 days untimely.

¶7 The record here confirms that a copy of every order, including the initial decision, was sent electronically to the e-mail address that Ms. Pensanti provided in the initial appeal paperwork. Although the appellant was not an e-filer, the record also reflects that he received a copy of every order via regular mail. Consistent with this precedent, we deem Ms. Pensanti (and thus, the appellant) to have received the initial decision on August 31, 2009, and we conclude that the PFR was filed 14 days late. *See Lima*, [101 M.S.P.R. 64](#), ¶ 5 (“Thus, as a matter of law, the appellant’s representative was served with the initial decision on August 31, 2005. Service on a party’s designated representative will be imputed to the party.”) (internal citations omitted); *Sofio v. Internal Revenue Service*, [7 M.S.P.R. 667](#), 670 (1981) (the appellant is responsible for the errors of his chosen representative).

¶8 The Board will waive its time limit only upon a showing of good cause for the delay in filing. [5 C.F.R. § 1201.114\(f\)](#). To establish good cause for the untimely filing of a PFR, the appellant must show that he exercised due diligence or ordinary prudence under the particular circumstances of the case. *Alonzo v. Department of the Air Force*, [4 M.S.P.R. 180](#), 184 (1980). To determine whether an appellant has shown good cause, the Board will consider the length of the delay, the reasonableness of his excuse and his showing of due diligence, whether he is proceeding *pro se*, and whether he has presented evidence of the existence of circumstances beyond his control that affected his ability to comply with the time limits or of unavoidable casualty or misfortune which similarly shows a causal relationship to his inability to timely file his PFR. *Moorman v. Department of the Army*, [68 M.S.P.R. 60](#), 62-63 (1995), *aff’d*, 79 F.3d 1167 (Fed. Cir. 1996) (Table).

¶9 Based on our review of the record, the appellant failed to show that he exercised due diligence in the pursuit of his appeal. As we already discussed, the appellant was represented by counsel throughout the pendency of this appeal. Moreover, a 14-day delay in filing his PFR is not minimal. *See Allen v. Office of Personnel Management*, [97 M.S.P.R. 665](#), ¶ 8 (2004). Additionally, he and his counsel failed to appear for three scheduled telephonic status conferences and failed to respond to three Orders to Show Cause, resulting in the dismissal of his appeal for failure to prosecute. He also failed to file a timely PFR, and he never filed a motion to accept the filing as timely and/or to waive the time limit for good cause, as directed by OCB. We note that, even if we were to excuse its untimeliness, the PFR identifies no error with the administrative judge's decision to dismiss the appeal for failure to prosecute. For these reasons, we DISMISS the PFR as untimely filed with no showing of good cause for the delay. *See* [5 C.F.R. § 1201.114](#)(f).

ORDER

¶10 This is the final decision of the Merit Systems Protection Board concerning the timeliness of the PFR. The initial decision will remain the final decision of the Board with regard to the dismissal of the appeal for failure to prosecute. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113](#)(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.